

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PFIZER INC, *et al.*,

Plaintiffs/Counter-Defendants,

v.

MATHEW I. GELFAND, M.D.,

Defendant/Counter-Plaintiff.

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Civil Action No.: 08 CV 02018 LAK

MOTION TO DISMISS

Defendant and Counter-Plaintiff, Mathew I. Gelfand, M.D. (“Dr. Gelfand”), by and through his undersigned counsel, hereby respectfully moves to dismiss Plaintiffs’ complaint for declaratory relief in this action because that complaint is inconsistent with the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

There is now pending in this Court a set of counterclaims and a jury demand by Dr. Gelfand against Counter-Defendants. Dr. Gelfand’s counterclaims allege the same patent infringement claims, in nearly the identical paragraphs, that inspired Counter-Defendants to file their complaint for declaratory judgment in this action. All facts and legal arguments contained in Counter-Defendants’ initial complaint for declaratory relief can be alleged as one more defenses to Dr. Gelfand’s counter-complaint for injunctive relief and damages. The only ostensible reason now for preserving Counter-Defendants’ Complaint is to allow the race to the courthouse to adjust the burdens and process of proof in this action, and/or to deny Dr. Gelfand a trial by jury as to all aspects of his claims for patent infringement triable as of right by jury.

The Courts are nearly in unison that the purposes of the Declaratory Judgment Act are not served where, as here, the suit is merely pre-emptive. *E.g., Crown Cork & Seal Co., Inc. v. Borden, Inc.*, 779 F. Supp. 33 (S.D.N.Y. 1991). In *Crown*, plaintiff filed an action for declaratory relief alleging that it owed no duty to defendant in connection with defective aerosol cans. Before moving to dismiss, plaintiff's action, defendant commenced a coercive action in a different judicial district of the United States. This Court granted defendant's motion to dismiss plaintiff's action for declaratory relief, calling plaintiff's conduct a species of "procedural fencing." *Id.* at 35. In *Crown*, as here, "the violations or disturbances" that plaintiffs seek to adjudicate as items for this Court's discretionary jurisdiction "have already occurred." *Id.* In *Crown*, as here, the defenses and Rule 11-type arguments that plaintiffs raise in their action for declaratory relief can as well be raised in response to Dr. Gelfand's counter-claims. *Id.*

WHEREFORE, Dr. Gelfand respectfully requests that this Court dismiss Counter-Defendants' action for declaratory relief and direct them to respond to Dr. Gelfand's counterclaims.

Dated: March 24, 2008
Bethesda, Maryland

Respectfully Submitted,

THE ROTBERT LAW GROUP, LLC

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*Attorney for Defendant/Counter-
Plaintiff Mathew I. Gelfand, M.D.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of March, 2008, I caused a copy of the foregoing **Motion to Dismiss** to be delivered via ECF filing and by United States Mail, postage prepaid, to:

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/s/ Mitchell J. Rotbert

Mitchell J. Rotbert

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)	
Defendant/Counter-Plaintiff.)	
_____)	

ORDER DISMISSING COMPLAINT

UPON CONSIDERATION of Defendant/Counter-Plaintiff's Motion to Dismiss
Complaint and any opposition thereto, it is hereby,

ORDERED, that Plaintiffs/Counter-Defendants' Complaint for Declaratory Relief
is hereby DISMISSED.

SO ORDERED.

Dated: _____

Lewis A. Kaplan
United States District Judge

Copies via electronic filing to:

David G. Elbert
Rudolf E. Hutz
Mitchell J. Rotbert